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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 93-36
Tariff Filing Requirements for	)	
Nondominant Common Carriers	)	

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REPLY OF SBC COMMUNICATIONS INC. IN SUPPORT OF ITS PETITION FOR RECONSIDERATION

JAMES D. ELLIS
DAVID F. BROWN
175 E. Houston
Room 1262
San Antonio, Texas 78205
(210) 351-3478

Of Counsel:

ROBERT M. LYNCH
DURWARD D. DUPRE
MARY W. MARKS
One Bell Center
Room 3520
St. Louis, Missouri 63101
(314) 235-2518

MARK L. EVANS
AUSTIN C. SCHLICK
GEOFFREY M. KLINEBERG
Kellogg, Huber, Hansen, Todd & Evans
1300 I Street, N.W., Suite 500 East
Washington, D.C. 20005
(202) 326-7900

Attorneys for SBC Communications Inc.

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Pursuant to Section 1.429(g) of the Commission's rules, SBC Communications Inc. hereby files its reply in support of its request that the Commission reconsider in part the Order released September 27, 1995, which established streamlined tariff filing requirements exclusively for nondominant common carriers ("Order"). The Commission should either extend streamlined tariff filing requirements to dominant carriers or, after notice and comment, provide a sufficient explanation for not doing so.

ARGUMENT

Notwithstanding the arguments of our opponents,* our petition for reconsideration does *not* ask the Commission to reclassify SBC as nondominant. Nor do we seek to broaden the scope of this proceeding beyond the central concern of this docket -- whether, and how, to adjust tariff filing requirements to "promot[e] price competition, foster[] service innovation,

* Memoranda in opposition to SBC's petition for reconsideration have been filed by the Ad Hoc Telecommunications Users Committee, the Association for Local Telecommunications Services, Cable & Wireless, Inc., the Competitive Telecommunications Association, Sprint Communications Company L.P., and the Telecommunications Resellers Association.

encourag[e] new entry into various segments of telecommunications markets, and enabl[e] firms to respond quickly to market trends." Order ¶ 4; Notice of Proposed Rulemaking, *Tariff Filing Requirements for Nondominant Common Carriers*, CC Docket No. 93-36, 8 FCC Rcd 1395, 1397 (1993). Our contention all along has been that this question cannot adequately be answered without at least addressing why these goals would not also be achieved by applying the Commission's streamlined procedures to so-called dominant carriers. We seek only the opportunity to demonstrate that the streamlined tariff filing requirements should be applied to SBC *regardless* of whether it is considered dominant or nondominant. We continue also to believe that it was error for the Commission to issue the Order without creating a record through notice and comment.

I. THE COMMISSION MUST EXPLAIN ITS REFUSAL TO APPLY STREAMLINED TARIFF FILING REQUIREMENTS TO DOMINANT CARRIERS

All of the reasons supporting streamlined tariff filing requirements for nondominant carriers -- namely, that they will promote price competition, foster service innovation, encourage new entrants, and enable quicker responses to market trends -- logically support the application of these same requirements to dominant carriers as well. The Commission may not arbitrarily deny the benefits of a new rule to a subcategory of local carriers when the justification for the rule applies equally well to all local carriers. At a minimum, the Commission must offer a reasoned explanation for why it has drawn the line where it has. Yet, from the moment it proposed the new rule in February 1993, the Commission has steadfastly refused to do so. This is the essence of arbitrary and capricious rulemaking.

The Commission's unwillingness to justify its position is all the more striking given the mounting evidence that it makes no sense to distinguish between dominant and nondominant carriers in the context of tariff filing requirements. As we explained in our petition, the Commission itself has acknowledged the harms and burdens of notification and cost-support requirements. *See* Petition at 5. Professor Robert Harris demonstrates in an affidavit accompanying this reply that the assumptions that may once have supported mandatory notice periods and cost-support requirements are no longer valid. *See* Harris Aff. ¶ 7 ("current state of the local access market does not justify the persistence of federal cost-support and notification requirements for dominant carriers"). These requirements have the effect of delaying price reductions, reducing competition, and inhibiting the introduction of new services. *Id.* ¶ 8.

Specifically, notification periods for dominant carriers diminish the incentive of *all* carriers to implement price reductions. Dominant carriers have little incentive to reduce their prices for they "know that the competitive benefit of any price cut is muted because the notice period gives CAPs and other carriers time to react to the cut even before it is allowed to take effect." *Id.* ¶ 11. Likewise, because nondominant carriers "know that they will have notice and time to respond to cuts by the LEC, these competitors are less aggressive in initiating their own price cuts." *Id.* The combined effect is that "rates remain higher than if LECs could implement price cuts swiftly, without notice to competitors." *Id.*

Similarly, the cost-support and notification requirements for dominant carriers have the effect of delaying the introduction of new services. "It takes time to prepare the information required by the Commission; when a filing is ready, commencement of the service then must wait until the end of the notice period." *Id.* ¶ 15. By reducing the profitability of new services, the Commission's regulations also "blunt[] the incentive for investing in the development and deployment of the technologies that enable the LEC to offer new services." *Id.* ¶ 17. A nondominant competitor with notice of a new service could enter the market first, "thereby capturing returns that otherwise would have gone to the innovating LEC." *Id.*

In addition, asymmetrical tariff filing regulations for dominant and nondominant carriers encourage CAPs to challenge filings before the Commission "in order to gain competitively valuable information and impose higher costs on LECs." *Id.* ¶ 20. The Commission long ago recognized that the vast majority of petitions to suspend or reject filings of dominant carriers come from competitors, not customers, who use them "as a dilatory tactic to postpone commencement of service or rate changes by competing carriers." Notice of Inquiry and Proposed Rulemaking, *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, 77 F.C.C.2d 308, 314 (1979). By increasing the asymmetry through the adoption of streamlined tariff filing requirements applicable to nondominant carriers, the Commission has only exacerbated the problem it identified 17 years ago. *See* Harris Aff. ¶ 21.

The existence of different tariff filing requirements for dominant and nondominant carriers has the effect, for all carriers, of reducing the incentive to lower prices and delaying the introduction of new services. Far from achieving its stated goals of promoting competition and innovation, the Commission's application of its asymmetrical tariff filing requirements will have precisely the opposite effect. If all carriers were subject to the same burdensome filing procedures as dominant carriers, there would at least remain an incentive to lower prices and provide new and innovative services. It is the asymmetry that destroys the incentive, and the Commission's Order has only made it worse. *Id.* ¶¶ 13, 17.

As Professor Harris explains, the costs of current filing rules for dominant carriers are not outweighed by any corresponding benefits; indeed, "some of the same economic forces that have magnified the costs of the current filing rules have simultaneously eroded the benefits associated with those rules." *Id.* ¶ 22. Both the rise of local competition and the adoption of price cap regulation "have made the dominant carrier filing requirements unnecessary for a wide variety of services." *Id.* ¶ 26. Where CAPs or other providers exert competitive pressure on the so-called dominant carriers, "review by the FCC in advance of a tariff change is unlikely to accomplish anything that market forces cannot do better. Unjustified rate increases will simply cause consumers to buy from a competing provider that undercuts the LEC's price." *Id.* ¶ 34. Furthermore, under a price cap regime, both monopoly and predatory pricing, as well as cross-subsidization, are virtually impossible, thus making cost-support and notification rules superfluous as a means of protecting consumers. *Id.* ¶¶ 35-41.

Even if the Commission is not prepared, on the present record, immediately to accept our argument and extend to dominant carriers the benefits of its streamlined tariff filing requirements, it should give parties the opportunity, thus far foreclosed, to develop a record sufficient to determine whether such action is consistent with its goals in this proceeding. Our opponents have suggested that the issue will be addressed in the pending price cap proceeding, *see* Second Further Notice of Proposed Rulemaking, *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1 (Sept. 20, 1995) ("*Price Cap*

Notice"), and that it would be redundant for the Commission to perform the same task in this proceeding. They are wrong for several reasons.

First, at issue in the price-cap proceeding is whether a LEC can be regulated as nondominant with respect to a particular service or geographic market even though it may be dominant with respect to other services or markets. *Price Cap Notice* ¶ 153. In contrast, what we seek in this proceeding is a determination that the streamlined tariff filing requirements apply equally to all carriers, regardless of whether the carrier is considered dominant or nondominant with respect to a particular service or market.

Second, the Commission has already made clear that it will not address in the price cap proceeding whether LECs, insofar as they are classified as dominant, should benefit from the tariff-filing flexibility granted to nondominant carriers. In response to a request that it apply the streamlined tariff filing requirements to dominant carriers, the Commission stated that the *Price Cap Performance Review* "is not the appropriate proceeding" in which to "reconsider any conclusion we reached in the *Nondominant Tariff Requirements Order*." First Report and Order, *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, 10 FCC Rcd 8961, 9114-15 (1995). It would be wholly arbitrary for the Commission now to refuse a similar request here on the ground that the issue should be raised instead in the price cap proceeding. This would epitomize the "administrative law shell game" that the D. C. Circuit condemned in striking down the Commission's forbearance policy. *AT&T v. FCC*, 978 F.2d 727, 732 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 3020 (1993).

Although the Commission has finally agreed to consider whether dominant carriers may be classified as nondominant, *see Price Cap Notice* ¶¶ 152-58, we present here the discrete question whether streamlined tariff filing requirements should apply to all carriers, regardless of their classification. That question can only be addressed in this proceeding. While the Commission is free to manage its docket and choose the order in which it wishes to address particular issues, that principle does not justify the Commission's action here. First, the Commission must consider whether failing to ease filing requirements for dominant carriers undermines the benefits claimed from easing them for nondominant carriers. Second, the Commission must at some point justify or reverse its decision to limit this proceeding to nondominant carriers; it may not refuse to address all the aspects of a single problem solely because it said it would not. *See* Petition at 6 ("the Commission has excluded some carriers from the scope of its rulemaking while including other carriers that are affected by the *same* issue in a similar way").

The Commission should reconsider its Order and apply to all carriers its new tariff-filing rules. At the very least, the Commission should reopen the record and solicit comment on this question.

II. THE ADMINISTRATIVE PROCEDURE ACT REQUIRES THE COMMISSION TO CONDUCT NOTICE AND COMMENT

Only the Telecommunications Resellers Association ("TRA") addresses our argument that the Administrative Procedure Act ("APA") requires the Commission to solicit further comment. TRA argues that the Commission reasonably found that the existing record was sufficiently fresh to support its Order and that no further round of notice and comment was necessary. *See* TRA's Mem. in Opposition at 11-12. But this only begs the question.

A decision not to consider additional evidence "must be made by the agency and supported in the record." *Mobil Oil Corp. v. EPA*, 35 F.3d 579, 584 (D.C. Cir. 1994). The Commission has made no finding that notice and comment is unnecessary on the question whether the new tariff filing rules should extend to all carriers. Even more important, no such finding could be "supported in the record," for the Commission has failed to compile any record at all.

TRA's effort to distinguish *Action on Smoking & Health v. CAB*, 713 F.2d 795 (D.C. Cir. 1983) ("*ASH*"), is entirely misdirected. *ASH* stands for the proposition that an agency should invoke the statutory exceptions to the notice and comment requirement "only in emergency situations when delay would do real harm." *Id.* at 800. An agency may not forgo notice and comment procedures simply by asserting that it does not believe that comments would be useful. *Id.* TRA stresses that the record in *ASH* was seven years old, whereas the record here is less than three years old. The issue, however, is not the age of the record but its contents. Even if the existing record were sufficient to support the elements of the streamlined filing requirements, it contains nothing to justify restricting those requirements to nondominant carriers.

Whenever it considers reissuing a vacated order in modified form, the Commission must either provide notice and an opportunity for comment or explain why it believes that there is good cause under the APA for reissuing the rule without additional comment. In this case, the Commission must permit comment on whether the new tariff filing requirements should apply to dominant carriers as they apply to nondominant carriers, because the exceptions to this requirement -- where notice-and-comment proceedings would be "impracticable, unnecessary, or contrary to the public interest," 5 U.S.C. § 553(b)(B) -- have no bearing on this case. The Commission may not dispose of SBC's argument by ignoring it.

CONCLUSION

The Commission should grant SBC's petition for reconsideration by extending to carriers currently regulated as dominant the same tariff filing rules that it has applied to carriers regulated as nondominant. At a minimum, the Commission should solicit comment on whether, and to what extent, the tariff reforms adopted in the Order should be applied to carriers currently classified as dominant.

Respectfully submitted,

MARK L. EVANS
AUSTIN C. SCHLICK
GEOFFREY M. KLINEBERG
Kellogg, Huber, Hansen, Todd & Evans
1300 I Street, N.W., Suite 500 East
Washington, D.C. 20005
(202) 326-7900

JAMES D. ELLIS
DAVID F. BROWN
175 E. Houston
Room 1262
San Antonio, Texas 78205
(210) 351-3478

Of Counsel:

ROBERT M. LYNCH
DURWARD D. DUPRE
MARY W. MARKS
One Bell Center
Room 3520
St. Louis, Missouri 63101
(314) 235-2518

Attorneys for SBC Communications Inc.

January 31, 1996

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AFFIDAVIT OF ROBERT G. HARRIS

INTRODUCTION

1. I am an Associate Professor in the Haas School of Business, University of California, Berkeley, with a Ph.D. in Economics from U.C. Berkeley. As an economist, I base my recommendations on microeconomic theory, industrial organization, and the principles of antitrust and regulatory policy analysis. I have drawn on my experience in the implementation of motor carrier and railroad regulatory reforms as a consultant to the U.S. Department of Transportation from 1976-79 and as Deputy Director of Cost, Economic, and Financial Analysis at the Interstate Commerce Commission from 1980-81, and my involvement in various federal and state regulatory proceedings. Hence, my recommendations are based on my experience as a regulator and as a consultant in the design and implementation of regulations for the transportation and telecommunications sectors. Further details of my academic and professional qualifications are provided in my attached curriculum vitae (Attachment I).

2. The purpose of this affidavit is to assess the traditional assumptions behind, and economic costs of, federal tariff notification and cost-support requirements for "dominant" carriers. I conclude that applying the existing requirements to dominant local exchange carriers (LECs) such as Southwestern Bell Telephone Company (SWBT), where their competitors are not similarly constrained, harms consumers and reduces economic welfare. LECs should be subject to the same notification and cost-support rules as competitive access providers (CAPs) and other "nondominant" carriers.

3. Section I of this affidavit provides an overview of the history of the "dominant carrier" classification and the assumptions underlying dominant carrier filing requirements. Section II summarizes the harms associated with current dominant carrier filing requirements. Section III concludes that, under today's regulatory and market conditions, the benefits to society of these rules are small and the risks associated with eliminating the rules are minimal. Section IV provides an historical perspective, using examples from the financial services and surface freight sectors, on how asymmetric regulation can be economically harmful.

I. THE ORIGINS OF AND ASSUMPTIONS UNDERLYING THE "DOMINANT CARRIER" CONCEPT

4. Dominant carrier regulation is an outgrowth of the *Competitive Carrier* rulemaking of the late 1970s and early 1980s, in which the Federal Communication Commission (FCC or Commission) amended the tariff-filing requirements for competitive (nondominant) common carriers as compared to dominant carriers. Chief among the dominant carriers were AT&T and its local telephone companies, which then controlled access to over 80 percent of the nation's telephones.[1] In its *Second Report and Order* in that proceeding, the Commission asserted its authority to forbear from applying tariff-filing and other regulations when forbearance promoted statutory objectives.[2] In its *Fourth Report and Order*, the Commission determined that nondominant interexchange carriers (IXCs) did not have to file tariffs for their interstate services.[3] The rationale for regulating nondominant carriers differently from dominant ones was that the dominant carriers constrained nondominant carriers from anticompetitive or anti-consumer behavior, but nondominant carriers were not sufficiently competitive to discipline the dominant carriers.

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[1] 85 F.C.C.2d pp. 1, 23 (1980).

[2] 91 F.C.C.2d 61 (1982).

[3] 95 F.C.C.2d 554 (1983). This "detariffing policy" was overturned in *MCI Telecommunications Corp. v. AT&T*, 114 S. Ct. 2223 (1994).

5. This logic has been given effect in the FCC's regulations governing the filing of tariffs for interstate services by common carriers. 47 C.F.R. § 61.38 requires dominant carriers to file cost-support information with the FCC for most revisions to tariffs for rate-of-return-regulated services. This information includes, among other things, cost studies for all relevant tariff elements for the most recent 12 month period, a 12 month cost projection, and estimates of the changes in traffic and revenues that will result from the tariff change. 47 C.F.R. § 61.49 requires the submission of analogous supporting information for tariffs related to price-capped services. 47 C.F.R. § 61.58 imposes mandatory notice periods ranging from 14 to 120 days for certain tariffs filed by dominant carriers and allows the Common Carrier Bureau to increase any lesser notice period to 120 days. Nondominant carriers, by contrast, have been allowed to proceed under "streamlined" notification and cost-support requirements.[4] They may, for instance, make new rates effective on one day's notice (47 C.F.R. § 61.23), and they need not comply with the extensive form and content rules applicable to dominant carriers (see, e.g., 47 C.F.R. §§ 61.22, 61.38(a)).

6. The logic of the notification and cost-support requirements depends upon assumptions about market power and regulatory limitations. Specifically, the key assumptions underlying the FCC's rules are that: (i) dominant carriers have insufficient competition to discipline their pricing behavior; (ii) dominant carriers have the ability and incentive to cross-subsidize competitive services from regulated revenues; and (iii) regulators cannot ensure just and reasonable rates without delaying the effective date of new tariff filings made by dominant carriers.

7. As explained below, these assumptions are no longer valid. The market for local telephone services, and particularly interexchange access services, has changed from one characterized by a regulated monopoly provider to one that is increasingly open and competitive. Regulatory techniques, notably price caps, also have given regulators a way to ensure reasonable rates without imposing cost-support and notification burdens. At the same

[4] 78 Rad. Reg. 2d (P&F) 1722 (1995).

time, the costs of the cost-support and notification requirements have mounted with the advent of greater local competition and the streamlining of filing requirements for the LECs' competitors. As the following sections will show, the current state of the local access market does not justify the persistence of federal cost-support and notification requirements for dominant carriers.

II. THE COSTS OF CURRENT FILING RULES

8. Cost-support requirements and notice periods reduce economic efficiency and impose economic costs on society. These costs include delaying price reductions, reducing the intensity of price-based competition, and inhibiting the introduction of new services. The Commission has cited many of these problems in relaxing regulatory requirements for nondominant carriers.[5] But the Commission's observations are equally applicable to dominant carriers. In fact, the Commission recently found that dominant carrier regulation hindered AT&T's ability to offer new services and price reductions and thereby inhibited competition in the market for interexchange services:

> The cost of dominant carrier regulation of AT&T in this context includes inhibiting AT&T from quickly introducing new services and from quickly responding to new offerings by its rivals. This occurs because of the longer tariff notice requirements imposed on AT&T, which allow AT&T's competitors to respond to AT&T tariff filings covering new services and promotions even before AT&T's tariffs become effective. The longer notice requirements imposed on AT&T thus also reduce the incentive for AT&T to initiate price reductions. In addition, to the extent AT&T were to initiate such strategies, AT&T's competitors could use the regulatory process to delay, and consequently, ultimately thwart AT&T's strategies.[6]

These observations are applicable in the context of interexchange access and local services as well.

9. CAP managers and customers acknowledge that LEC tariff filing requirements give CAPs a competitive advantage and reduce the intensity of competition in access markets. For

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[5] *See, e.g.*, 8 F.C.C. Rcd 6752, 6756 (1993).

[6] AT&T Nondominance Decision, FCC 95-427 (Oct. 23, 1995), at 18.

example, Barbara Sampson, the Senior Vice-President and co-founder of Intermedia Communications, a Florida-based CAP, has said that her company enjoys "a natural competitive advantage" because it is "not confronted by the regulatory burden like the telcos and the cable companies."[7] Similarly, a managing analyst at Datapro (a large CAP customer) believes that the key to the current success of CAPs is the fact that they can be more responsive to customer requests than LECs: "If a user asks for something off-tariff, the RBOC has to deal with regulatory issues that the CAP doesn't."[8] There are several ways in which this asymmetry harms consumers and competition. The Commission staff similarly noted in an analogous context that "[i]f only the LECs are subject to rigid rate structure rules, they will be at a competitive disadvantage in their ability to respond to the market. LEC customers may choose to take service from a competitor in order to avoid artificially high LEC rates or to obtain alternative rate structure options."[9]

A. Delaying and Diminishing Price-Based Competition

10. Assuming that rates remain above predatory levels (an issue I discuss below), the FCC's notification requirement harms consumers whenever a dominant carrier seeks to reduce its rates, because it delays the reduction. While the FCC reviews the tariff, consumers pay more than they should. Similarly, discount pricing, including term and volume discounts, is a competitive necessity in a telecommunications environment where there is little product differentiation among different suppliers. Notice requirements that delay the introduction of such discounts impede competition and prevent customers from obtaining the lowest possible price for the services they purchase.

11. In addition to delaying the effect of dominant carriers' price cuts and discounts, the notification period deters *all* carriers from cutting rates. LECs know that the competitive

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[7]Titch, *In a Quest for Growth, Competitors Invade More Telco Markets*, TELEPHONY, June 28, 1993, at 6.

[8]Brier and Finn, *CAPitalizing on Local Access*, NETWORK WORLD, Sept. 6, 1993.

[9]ACCESS REFORM TASK FORCE, FCC STAFF ANALYSIS, FEDERAL PERSPECTIVE ON ACCESS CHARGE REFORM, Apr. 30, 1993, at 34.

benefit of any price cut is muted because the notice period gives CAPs and other carriers time to react to the cut even before it is allowed to take effect. Because LECs effectively must telegraph their competitive strategies to competitors that are not similarly constrained, they realize significantly reduced gains from such strategies.[10] Notification also reduces the incentive for the LECs' competitors to initiate price cuts. Because they know that they will have notice and time to respond to cuts by the LEC, these competitors are less aggressive in initiating their own price cuts. As a result of both factors, rates remain higher than if LECs could implement price cuts swiftly, without notice to competitors.

12. Finally, notification periods prevent LECs from responding efficiently to changes in the market. Because LECs cannot respond quickly where costs have increased or rates have been dropped too far, they may be less inclined to drop rates when cost decreases are first indicated. If price decreases are certain, LECs still cannot drop prices immediately, but must wait out the notification period while nondominant competitors capture price-sensitive customers.

13. Asymmetric notification periods also make it more difficult to realize certain regulatory goals. When notification periods impede efficient pricing, competitors target the affected customers. Such targeted initiatives directed at profitable LEC customers cause LECs to lose the contribution to common costs they could otherwise realize from those customers. This leaves a larger share of common costs to be borne by the remaining customers. If LECs are handicapped in competing for the most profitable market segments, they will be less able to provide low-cost, high-quality service to the other market segments and will have diminished financial incentives to invest in the telecommunications infrastructure -- especially in rural, high-cost areas.

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[10]As the Supreme Court has suggested, it is particularly questionable from an antitrust perspective "to require . . . the dominant carrier, the firm most likely to be a price leader," to signal its prices in advance. *MCI Telecommunications Corp. v. AT&T*, 114 S. Ct. 2223, 2233 (1994).

14. Because notice periods delay price cuts from taking place and deter carriers from making them in the first place, consumers lose. These effects are a major cost of the current regime.

B. Inhibiting New Service Introductions

15. Federal cost-support and notification requirements also serve to delay the introduction of new services subject to federal jurisdiction. It takes time to prepare the information required by the Commission; when a filing is ready, commencement of the service then must wait until the end of the notice period. Even putting aside delays caused by cost-support requirements, the delays occasioned by the notification obligation are substantial. Many dominant carrier tariff filings must be made with 45 days' notice, and some require 90 or 120 days' notice.[11] Even for those requiring only 14 days' notice, third-party intervention or investigation by the Commission can increase the effective notice period up to 120 days.[12]

16. Such delays are costly to LECs, harm the customers who would benefit from immediate availability of new services, and reduce competition in the marketplace. The Commission has acknowledged this problem, stating that:

> "The development of cost support information in the reporting requirements, and the delay associated with notice requirements and tariff review under the current rules do generate delay and increase the costs of introducing new services. They may also inhibit the LECs' ability to compete with services offered by CAPs."[13]

17. This problem is especially severe because the Commission's regulation of new services can slow the rate of technological progress by reducing the profitability of new services, thereby blunting the incentive for investing in the development and deployment of

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[11]47 C.F.R. § 61.58(c).

[12]According to SWBT, eight of its tariff filings in 1995 became effective after being delayed beyond the ordinary notice period. Seven of the eight became effective three or more months after they were filed.

[13]9 F.C.C. Rcd 1687, 1702 (1994).

the technologies that enable the LEC to offer new services. First, if regulation delays a new service, then the revenue stream from the service is pushed into the future, reducing the present value of the service. Second, the cost of complying with regulation reduces the profitability of new services. Finally, the notification process could allow a competitor to enter the market first, thereby capturing returns that otherwise would have gone to the innovating LEC. New products or services often have a short shelf life and generate much of their profits shortly after introduction. According to a McKinsey & Company study, in many industries a product that is six months late to market will miss out on one-third of the total potential profit over the product's lifetime.[14]

18. Note that the relationship between technological change and new services runs in two directions. While it is widely appreciated that new technologies enable firms to provide new services, it is just as true that the revenues from new services enable firms to develop and deploy new technologies. Even short delays in new services can have a negative impact on capital budgeting decisions involving new technologies, by reducing the revenue stream beyond the economic "break-even point" and transforming a positive present value into a negative one. In the worst cases, delays in new services can eliminate their window of opportunity: being too late to market with a new service is no better than not getting to market at all.[15] Thus, by allowing LECs to introduce new tariffs on one day's notice, the Commission can facilitate the development and the adoption of better technologies, ensuring that users will obtain the benefits of innovation.[16]

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[14]Mendez and Pearson, *Purchasing's Role in Product Development: The Case for Time-Based Strategies*, INTERNATIONAL JOURNAL OF PURCHASING AND MATERIALS MANAGEMENT, Jan., 1994, at 3.

[15]Indeed, it can be much worse: costs have been incurred and customer relations damaged by expectations of beneficial new services that are delayed or prevented by the regulatory process.

[16]The Commission staff report recognized that "access rules must also not impede the introduction of new technologies and services through unnecessary regulatory delay . . . ." ACCESS REFORM TASK FORCE, FCC STAFF ANALYSIS, FEDERAL PERSPECTIVE ON ACCESS CHARGE REFORM, Apr. 30, 1993, at 29.

19. Expediting the tariffing of new access services will facilitate the deployment of new information technologies and help American businesses face one of their toughest challenges: the increasing pace of product development and decreasing length of product life cycles.[17] The importance of information technologies as inputs into the production processes of many business enterprises explains why businesses often take the initiative to demand new communications services[18] and why the costs of delaying new communications services are so high. American consumers, not just the regulated LECs, suffer from delays in new service offerings. In many cases, the LECs' customers will turn to the less desirable offerings of other suppliers to fill their immediate demands; in others, customers may lack such alternatives to LEC services, which makes the cost of delay all the greater.

C. The Strategic Use of Regulatory Process by LECs' Competitors

20. All of the costs mentioned above are exacerbated by the ability of the CAPs to make strategic use of current regulatory asymmetry. Because LECs must file cost-support information that other carriers such as CAPs do not have to provide, CAPs have a strong incentive to challenge LEC tariff filings and demand detailed cost support data in order to gain competitively valuable information and impose higher costs on LECs. Similarly, granting nondominant carriers the right to make tariffs effective on one day's notice increased these carriers' ability to exploit the long lag time in dominant carrier filings, making it even more likely that the LEC will receive diminished returns from its price and service initiatives.

21. As far back as 1979, the FCC expressed concern that "approximately three-quarters of the petitions to suspend or reject filings of OCCs [dominant carriers] came from competing carriers, and not customers . . . . In many, if not most, cases it is apparent that these petitions are being used by competitors as a dilatory tactic to postpone commencement of service rate

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[17]"[M]arket and product demands are changing faster than ever . . . . [T]o keep pace with this change, firms are finding that they must be able to build and deliver high-quality, customized goods and services . . . and get products to market quickly." Boynton, *Achieving Dynamic Stability Through Information Technology*, CALIFORNIA MANAGEMENT REVIEW, Jan., 1993, at 58.

[18]Mendez and Pearson, *Purchasing's Role in Product Development: The Case for Time-Based Strategies*, INTERNATIONAL JOURNAL OF PURCHASING AND MATERIALS MANAGEMENT, Jan. 1994, at 3.

changes by competing carriers."[19] As tariff filing requirements on CAPs have been relaxed, the anti-competitive effects of asymmetric cost-support and notification requirements have been exacerbated. With the risk that they might have to satisfy similar obligations removed, the nondominant carriers are now unconstrained in their gaming of the current regulatory rules.

III. CHANGED MARKET AND REGULATORY CONDITIONS HAVE RENDERED NOTICE AND FILING REQUIREMENTS UNNECESSARY

22. Of course, these costs might be consistent with the public interest if the current dominant carrier filing requirements were necessary to serve other, overriding policies. Yet some of the same economic forces that have magnified the costs of the current filing rules have simultaneously eroded the benefits associated with those rules. As explained below, the justifications given for the rules are no longer sufficient to support their continuation.

23. The Commission had specific goals in mind when it established the current dominant carrier filing requirements. The cost-support requirements of § 61.38, for example, were designed to ensure that the FCC would have sufficient data to evaluate the cost justifications for proposed tariff changes to rate-of-return-regulated services. The Commission requires cost-support data to make sure that rates properly relate to the costs of the particular service for which the tariff is filed, and that costs of unregulated services are not being included improperly to cross-subsidize competitive businesses. In the FCC's words, the cost data are used to evaluate "the justness and reasonableness of rate levels and rate structures" and are "'particularly important . . . where questions are raised as to whether a new or reduced rate competitive service is being cross-subsidized by other services and whether there is factual support for allegations of anticompetitive impact from such rates.'"[20]

[19] 77 F.C.C.2d 308, 314 (1979).

[20] 77 F.C.C.2d, 308, 312-313 (1979) (quoting 40 F.C.C.2d 147, 153 (1973)).

24. Similarly, the filing requirements of § 61.49 were implemented to limit "a carrier's ability to engage in drastic price changes to the detriment of ratepayers."[21] For instance, the Commission requires that below-band tariff filings be accompanied by information "showing that the proposed rates cover the cost of providing the service, and are otherwise just, reasonable, and nondiscriminatory."[22] Supporting cost data likewise are required when a dominant carrier files a tariff for a new service.[23]

25. The notice requirements of § 61.58 were established for two basic purposes. First, by "afford[ing] any affected customer sufficient opportunity to comment on the tariff filing within the time period established,"[24] the Commission intended to allow consumers a chance to provide information in their possession before the rate took effect. The notification period was also implemented to enable the FCC to review the carrier's cost-support data before allowing a rate change to go into effect. The notification period thus was intended to help the Commission ensure that rates are reasonable,[25] and that dominant carriers do not exploit their market power unlawfully.[26]

26. The assumptions underlying the notice requirements and cost-support provisions have become obsolete. In particular, the rise of local competition and the FCC's adoption of price-cap regulation have made the dominant carrier filing requirements unnecessary for a wide variety of services. Whereas the costs of the current asymmetric regulation are great, there are few risks to eliminating the current dominant carrier filing requirements.

[21] 3 F.C.C. Rcd 3195, 3373 (1988).

[22] 3 F.C.C. Rcd at 3371-3372 (1988); *see* 47 C.F.R. § 61.49(d).

[23] 47 C.F.R. § 61.49(g).

[24] 5 F.C.C. Rcd 6480, 6532 (1990).

[25] 9 F.C.C. Rcd 1687, 1702 (1994).

[26] 85 F.C.C.2d 1, 14 (1980); 84 F.C.C.2d 445, 458 (1981).

A. Competition, Especially in Access Services, Constrains LECs

27. LECs such as SWBT faced very limited competition 10 years ago. Today, however, LECs face a host of competitors: CAPs, IXCs, cable companies, self-suppliers, wireless carriers, and local service resellers. These competitors are, and will be, able to punish LECs that keep their prices above competitive levels by undercutting them and capturing market share. This section briefly discusses significant competitors, particularly CAPs, and explains the importance of their emergence.

28. Right now, CAPs are particularly strong access competitors. CAPs have substantially more than 280,000 miles of fiber optic cable in place in cities served by their networks;[27] this excludes important competitors such as Teleport Communications Group (TCG), MCI Metro, and Time Warner Communications that do not report their fiber miles.[28] CAPs have an increasing market share and enjoy the luxury (not shared by LECs) of picking among customers. This ability to pick and choose is particularly important because the demand for telecommunications services is highly concentrated. CAPs structure their services around the fact that the demand for telecommunications services is highly concentrated among customers and classes of services; a small percentage of customers, lines, and geographic areas account for a very large share of the revenues in most service categories. CAPs have targeted the small share of the customers who account for a large share of revenues.[29] This greatly facilitates entry because an entrant can reach a very large share of market revenues by serving

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[27]HERB KIRCHOFF & MADELINE MURPHY, TELECOM PUBLISHING GROUP, INSIDE THE COMPETITIVE LOCAL EXCHANGE 1995, at 135.

[28]New entrants have every incentive to understate or conceal their market penetration in order to gain competitive advantages through the regulatory process. Of the 25 CAPs surveyed by the Telecommunications Publishing Group (TPG), 21, including MFS, Teleport, and MCI Metro, would not provide information on the number of customers they are serving and nine did not respond in any way to TPG's queries. HERB KIRCHOFF & MADELINE MURPHY, TELECOM PUBLISHING GROUP, INSIDE THE COMPETITIVE LOCAL EXCHANGE 1995, at 135.

[29]Baumol notes what he calls the 80/20 rule: 20% of the customers in the local exchange account for 80% of the revenues. See WILLIAM J. BAUMOL & J. GREGORY SIDAK, TOWARD COMPETITION IN LOCAL TELEPHONY 11 (1993).

a small share of customers at relatively low cost. Even if the incumbent retains a large share of its customers, it may lose a substantial share of traffic and revenues.[30]

29. This geographic concentration can be seen in Attachment II, maps 1-6, which show that a substantial portion of SWBT's access services revenue is concentrated in a small part of the company's total service area. A mere 3% of SWBT's wire centers generated 30% of access services revenue and 11% of wire centers generated 60% of access services revenue. Meanwhile, another 64% of SWBT's wire centers generated only 10% of access services revenue.

30. CAPs' expanding networks demonstrate SWBT's vulnerability to competition. CAPs have built networks in the business corridors of cities such as Dallas, Houston, Kansas City, St. Louis, San Antonio, Tulsa, and Wichita (see Attachment II, maps 7-13), which accounted for 43% of SWBT's access services revenue as of February 1994. Table I provides a partial list of CAPs that had networks in operation or under development in SWBT's service area as of September 1, 1995.

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[30] This problem is exacerbated by the LECs' obligations to serve as carriers of last resort. LECs must serve the highest-cost customers, but the new entrants have no such requirement.

Table I*
Competitive Local Network Locations in SWBT Cities**
(as of September 1, 1995)

Company Name	Network Location
American Communications Services Inc.	El Paso, Fort Worth, TX; Little Rock, AR
Brooks Fiber Communications	Little Rock, AR; Oklahoma City, Tulsa, OK
Hyperion Telecommunications	Wichita, KS
Intermedia Communications of Florida Inc.	St. Louis, MO
MCI Metro	Dallas, Houston, TX; St. Louis, MO.
Metro Access Networks Inc.	Arlington, Austin, Dallas, El Paso, Fort Worth, San Antonio, TX
MFS Communications Co. Inc.	Dallas, Houston, TX; St. Louis, MO
Teleport Communications Group	Dallas, Houston, Fort Worth, TX; St. Louis, MO
Time Warner Communications	Austin, Houston, TX; Kansas City, MO

*Source: HERB KIRCHOFF & MADELINE MURPHY, TELECOM PUBLISHING GROUP, INSIDE THE COMPETITIVE LOCAL EXCHANGE 1995.
**Includes networks in operation and under development.

31. As entry by CAPs and others increases, SWBT loses revenue in two ways. First, SWBT loses revenue when traffic is carried over CAP facilities instead of SWBT's network. Second, in response to competition from CAPs, IXCs, and self-suppliers, SWBT has lowered prices for special and switched access services, resulting in lower revenues from those customers that retain SWBT's service. This lost "contribution" makes it more difficult to continue providing local exchange services to high-cost and low-income residential customers, many of whom do not pay the full cost of local exchange service.